

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	§	
Review of Section 272(f)(1) Sunset of	§	
the BOC Separate Affiliate and Related	§	WC Docket No. 02-112
Requirements	§	
2000 Biennial Regulatory Review	§	
Separate Affiliate Requirements of	§	
Section 64.1903 of the Commission's	§	CC Docket No. 00-175
Rules	§	

**Comments of the Public Utility Commission of Texas**

On May 19, 2003, the Federal Communications Commission (FCC) released a *Further Notice of Proposed Rulemaking* (FNPRM) in the Matter of Review of Section 272(f)(1) Sunset of the Bell Operating Companies (BOC) Separate Affiliate and Related Requirements, WC Docket No. 02-112, FCC No. 02-148 and the Matter of 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules, CC Docket No. 00-175. In this FNPRM, among other things, the FCC seeks comment on whether there is a continued need for carrier regulation of a Bell Operating Company's (BOC's) in-region, interstate, and international interexchange services after sunset of the BOC's section 272 separate affiliate requirements.

The Public Utility Commission of Texas (Texas PUC), having general regulatory authority over public utilities within our jurisdiction in Texas, submits these comments in response to the FNPRM.

**I. INTRODUCTION**

The Texas PUC has already filed comments in this docket indicating its strong belief that the sunset or modification of the section 272 separate affiliate requirements for Southwestern Bell Telephone L.P. d/b/a SBC Texas ("SBC Texas") at this time would be imprudent and premature. Nonetheless, whether the FCC declines to permit SBC Texas's section 272 separate affiliate requirements to sunset this year or not, these requirements will clearly sunset at some point in the future and, for this reason, the Texas PUC is commenting on this FNPRM. These comments are limited and do not attempt to answer all of the questions posed in the FNPRM. In particular, these comments address only SBC Texas and

do not address appropriate regulation of independent incumbent local exchange carriers' (independent LECs') long distance services.

To implement section 272, the FCC created a set of nondiscrimination safeguards designed to discourage and detect improper cost allocation and cross-subsidization between a BOC and its affiliate.<sup>1</sup> As the FCC stated in the May 24, 2002 NPRM in this matter, the safeguards were an acknowledgement that the BOCs have market power in the provisioning of local exchange and exchange access services in their respective service areas.<sup>2</sup> The May 24, 2002 NPRM further stated that "as long as the BOCs retain market power in the provision of these services, they will have an incentive and ability to discriminate against their long distance competitors, and engage in other anti-competitive conduct."<sup>3</sup> As the FCC stated in the order approving SBC Texas's 271 Application, "compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field."<sup>4</sup>

The Texas PUC believes that, although some progress has been made toward leveling the field, SBC Texas's continued dominance over local exchange and, importantly for this FNPRM, exchange access services still hinders the development of a fully competitive market, especially given the current status of the financial markets, competitive local exchange carriers (CLECs) access to capital, and the bankruptcy of many competitive carriers. This is especially worrisome if SBC Texas's section 272 separate affiliate requirements are permitted to sunset this year. Moreover, there are reasons to be concerned

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<sup>1</sup> See *Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*). The safeguards are codified at 47 C.F.R. §§ 53.1 – 53.213 (2001).

<sup>2</sup> NPRM at 3, citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21911-12.

<sup>3</sup> NPRM at 3.

<sup>4</sup> *Application by SBC Communications Inc, Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket 00-65, Memorandum Opinion and Order, ¶ 395 (rel. Jun. 30, 2000), quoting *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20725 (1997).

that continued vibrant competition in interexchange markets could be harmed if no appropriate regulation of SBC Texas's provision of interexchange services is in place following sunset of the section 272 separate affiliate requirements.

At this point in time SBC Texas retains both the incentive and ability to discriminate against both local and interexchange competitors and to engage in anti-competitive behavior. The Texas PUC expects that, after sunset of its section 272 separate affiliate requirements, SBC Texas will continue to exercise control over essential local bottleneck facilities. The Texas PUC reiterates its position that removal of the separate affiliate requirements at this time would fail to meet Congress' objectives in implementing section 272. Following the sunset of section 272 requirements, without appropriate regulation, the Texas PUC and the FCC would lose their ability to ensure that SBC Texas complies with its obligation to provide nondiscriminatory access to the local exchange and exchange access markets that it controls.

Though the safeguards contained in sections 272(e)(1) and (3) do offer some assurance that SBC Texas will be required to provide nondiscriminatory access to bottleneck local facilities, those provisions do not offer any means to verify that access is indeed provided on a nondiscriminatory basis.<sup>5</sup> Without requirements in place that require SBC Texas to provide in-region interexchange services via a separate corporate division or – at a bare minimum – to maintain separate books of account, neither the FCC nor this Commission will have the ability to discern whether SBC Texas is indeed meeting the nondiscrimination requirements.

## **II. COMMENTS REGARDING SPECIFIC QUESTIONS POSED IN THE FNPRM**

A. In ¶14 of the FNPRM, the FCC seeks comment regarding the extent to which facilities deployment by CLECs and other competitive providers have reduced incumbent LEC market power over access and further asks whether the BOCs possess market power in access service markets.

The Texas PUC has identified at least one case that could indicate that problems exist in SBC Texas's nondiscriminatory provisioning of access services. A complaint was filed by a competing long distance carrier alleging that SBC Texas, since receiving section 271 approval in Texas, has engaged in intra-corporate, cross-subsidization practices with its long

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<sup>5</sup> 47 C.F.R. §§ 272(e)(1) & (3).

distance affiliate that have enabled it to engage in price squeezes for interLATA and intraLATA telecommunications services that are anti-competitive, predatory, unreasonably preferential and discriminatory.<sup>6</sup> When SBC Texas's section 272 separate affiliate requirements sunset, it is critical that SBC Texas be required to maintain separate books of account for the provision of interexchange service and possibly to maintain a separate corporate division that is subject not only to accounting review but also to certain safeguards. Without separate books of account, it will be practically impossible for the Texas PUC to evaluate complaints by competitors of practices such as discrimination and cross-subsidization.

Without safeguards in place following sunset of SBC Texas's section 272 separate affiliate requirements, the Texas PUC will be unable to ascertain whether SBC Texas provides special access on a nondiscriminatory basis to competitors. Some sort of structural separation remains the most effective means of assessing the BOCs' compliance with the statutory obligation not to discriminate against other entities in favor of its affiliates.

B. In ¶24 of the FNPRM, the FCC requests information regarding changes in the interexchange market following SBC Texas's receipt of section 271 authority. Although the information is now slightly dated, in January of this year the Texas PUC prepared and filed with the 78<sup>th</sup> Texas Legislature a report entitled "Scope of Competition in Telecommunications Markets in Texas." (*Scope Report*)<sup>7</sup> Chapter 3, Section C of the *Scope Report* focuses on the long distance market in Texas including a market share analysis.<sup>8</sup> According to the *Scope Report*, between the time SBC Texas entered the in-state interLATA telephone markets in 2000 and June 30, 2002, SBC Texas's share of the Texas long-distance market has grown. Comparing the long-distance market share (measured in minutes-of-use) jointly held by AT&T, MCI/WorldCom, and Sprint with that of SBC and other carriers,<sup>9</sup> the

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<sup>6</sup> *Complaint of AT&T Communications of Texas, L.P. against Southwestern Bell Telephone Company and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance* at 2-3, Docket No. 23063 (Sept. 22, 2000) (pending).

<sup>7</sup> For the full report on the 2003 Report to the 78<sup>th</sup> Texas Legislature on the Scope of Competition in Telecommunications Markets in Texas, please visit:  
<http://www.puc.state.tx.us/telecomm/reports/scope/index.cfm>.

<sup>8</sup> *Scope Report* at 37 – 38.

<sup>9</sup> As noted on page 37 of the *Scope Report*, the other category includes facilities-based IXC's, such as Williams Communications and Broadwing, Inc., as well as resellers.

market share of SBC and others grew from 23% in 2000, to 34% in 2001, and reached 41% in 2002.<sup>10</sup>

C. In ¶29 of the FNPRM, the FCC requests information regarding the effect on interexchange telecommunications markets of BOCs' market power in their unilateral ability to raise prices by increasing their rivals' costs or by restricting their rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities needed by their rivals to offer services. In ¶30 of the FNPRM, the FCC requests comment on the incentives and abilities BOCs have to use market power in the local exchange and exchange access markets to harm competitors providing interexchange services.

As ¶29 of the FNPRM itself notes, the FCC has previously found that BOCs might leverage their market power in the local exchange and exchange access markets through cost-misallocation, raising their rivals' costs, improper discrimination to gain an advantage in the interexchange telecommunications services market, or a predatory price squeeze.<sup>11</sup> As further noted in that paragraph, the FCC raised concerns in the *LEC Classification Order* about the incentive and ability of these carriers to engage in a predatory price squeeze (e.g., by raising the price of their access services but not their interstate interexchange prices or by lowering interstate interexchange prices to be at or below the price of their access services).<sup>12</sup>

The Texas PUC believes that each of these continues to be a valid concern. Without safeguards in place and some continued separation of functions (between the provider of access services and the affiliated interexchange carrier), there is reason to predict that the BOCs will have powerful incentives and ability to leverage their market power in the local exchange and exchange access markets as noted *supra*. As noted in Section A, *supra*, a complaint was filed by a competing long distance carrier alleging that SBC Texas has

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<sup>10</sup> *Scope Report* at 37 – 38.

<sup>11</sup> See, e.g., *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC 14,712, 14,764, 14,795-99, 14,807-17, ¶¶107, 186-196, 212-235 (1999) (*SBC/Ameritech Merger Order*); *LEC Classification Order*, 12 FCC Rcd at 15,815-19, 15,821-26, 15,829-33, 15,847-15,857, ¶¶ 103-108, 111-119, 125-130, 158-175); *Non-Accounting Safeguards NPRM*, 11 FCC Rcd at 18,886, para. 14. See also *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 16 FCC Rcd 9923, 9937, ¶34 (2001)(*CLEC Access Charge Order*).

<sup>12</sup> *LEC Classification Order*, 12 FCC Rcd at 15,830-33, 15,836-40, 15,847-57, ¶¶127-130, 135-142, 156-175.

engaged in intra-corporate, cross-subsidization practices with its long distance affiliate that have enabled it to engage in price squeezes for interLATA and intraLATA telecommunications services that are anti-competitive, predatory, unreasonably preferential and discriminatory.<sup>13</sup> The complaint in fact alleges most of the dangers noted by the FCC in ¶29 of the FNPRM. Whether the complaint is meritorious or not, what it demonstrates is that the Texas PUC must retain the ability to evaluate such concerns that may be brought before it. After the sunset of SBC Texas's section 272 separate affiliate requirements, without some of the structural and accounting safeguards noted herein, the Texas PUC will be without important tools to evaluate the merits of such a complaint.

Sunset of SBC Texas's section 272 separate affiliate requirements will not diminish SBC Texas's market power or its incentive and ability to engage in some of the discriminatory, anticompetitive practices discussed herein. It will instead harm regulators' ability to find solid evidence of such practices. For this reason, continuing safeguards are necessary following sunset.

D. In ¶31 of the FNPRM, the FCC requests comment on its earlier findings that BOCs with section 271 approval will have the ability and incentive to discriminate against termination of interexchange calls by other carriers. In particular, comment is sought on how this incentive will be affected if the service is offered by the integrated BOC entity.

The Texas PUC believes that the *incentives* are more or less the same for a BOC with section 271 approval to discriminate regarding termination of interexchange calls by other carriers – whether the BOC is integrated or whether its interexchange service is provided via a separate, wholly-owned affiliate or subsidiary. However, the *ability* of the integrated BOC to discriminate without detection will be substantially enhanced if the separate affiliate requirements are removed. In the opinion of the Texas PUC, the main benefit to requiring some separation of function is not to affect incentives or abilities to discriminate but rather to preserve regulators' ability (and, if needed, the ability of courts) to ascertain whether inappropriate discrimination took place. The more separate the BOC entity providing interexchange service is from the BOC entity providing local exchange and access services,

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<sup>13</sup> *Complaint of AT&T Communications of Texas, L.P. against Southwestern Bell Telephone Company and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance* at 2-3, Docket No. 23063 (Sept. 22, 2000) (pending).

the more difficult it will be to hide inappropriate discrimination in favor of the affiliate in an evidentiary proceeding.

### **III. CONCLUSION**

The Texas PUC appreciates the opportunity to comment on the FCC's FNPRM, and to assist the FCC in developing long-term solutions to the issues addressed. The Texas PUC continues to urge the FCC to extend SBC Texas's structural separation and related requirements under section 272 as stated in earlier comments. Following sunset, the Texas PUC believes that SBC Texas should, at a minimum, be required to maintain separate books of account for the provision of interexchange service and possibly to maintain a separate corporate division that provides in-region interexchange service that is subject not only to accounting review but also to certain safeguards. Without such safeguards, it will be practically impossible for state commissions such as the Texas PUC, or indeed even for the FCC, to adequately evaluate complaints by competitors of practices such as discrimination and cross-subsidization.

**Respectfully submitted,**

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**June 18, 2003**

**/Original signed/**

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